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(Article begins on next page)

Book Review

What Consequences Do Ideas Have?

THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW. By Steven M. Teles. Princeton, N.J.: Princeton University Press, 2008. 339 pages. \$35.00.

Reviewed by Mark Tushnet^{*}

I. Introduction

How do you challenge a dominant ideology? If you have a very long time horizon, all you need, you might think, are better ideas.¹ With a shorter time horizon—if, for example, you hope to influence public policy within the foreseeable future—you need more. As Steven Teles observes, the fact that an ideology is dominant means that those who accept it are likely to control institutions whose use is important to challengers with a short time horizon.² These incumbents act as gatekeepers, treating some ideas as worth considering, even if mistaken, and ignoring or ridiculing others.³ Successful

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1. Think here of Friedrich Nietzsche. During most of his lifetime, Nietzsche's works were lightly read and not particularly influential. Even so, he concluded his final book with a chapter entitled "Why I Am a Destiny," in which he confidently predicted that his anti-moral philosophy would one day unseat the "slave-morality" that he believed had come to dominate Europe. See FRIEDRICH NIETZSCHE, ECCE HOMO: HOW ONE BECOMES WHAT ONE IS, *reprinted in* ON THE GENEALOGY OF MORALS AND ECCE HOMO 215, 326–27 (Walter Kaufmann ed. & trans., Vintage Books 1969) (1888) ("I know my fate. One day my name will be associated with the meaning of something tremendous—a crisis without equal on earth. . . . I was the first to *discover* truth I am necessarily also a man of calamity. For when truth enters into a fight with the lies of millennia, we shall have upheavals . . . the like of which has never been dreamed of."); see also Robert Wicks, *Friedrich Nietzsche*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/entries/nietzsche> (last modified July 15, 2008) ("During his creative years, Nietzsche struggled to bring his writings into print and never doubted that his books would have a lasting cultural effect. He did not live long enough to experience his world-historical influence . . .").

2. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 15, 14–15 (2008) (discussing advantages for incumbents in professional institutions, such as control over hiring decisions and over "access to the information that flows through personal and professional networks").

3. *Id.* at 16 ("A regime is most likely to endure when it can make its ideas seem natural, appropriate, and commonsensical, consigning its opponents to the extremes.").

challengers need to transform these gatekeeping institutions or develop their own.⁴

Steven Teles's wonderful book, *The Rise of the Conservative Legal Movement*, is a case study of ideological challenge. Teles, a political scientist, emphasizes the institutional dimensions of such challenges.⁵ Relying on interviews and internal documents produced by conservative organizations,⁶ he examines the development of conservative litigating groups (i.e., conservative public interest law firms), the growth of the Federalist Society, and the embedding of law and economics within the legal academy. There have been similar studies of liberal public interest law firms and of the rise of liberal legalism in the academy,⁷ but Teles's is the first to look on the other side of the ideological divide.⁸ And, given the dominance of liberal legal

4. See *id.* at 17 (“[A]n effective challenge to the dominant regime must sink roots in those institutions or produce alternative institutions also capable of producing not only knowledge but also reputations, prestige, and distinction.”).

5. As I note below, Teles is less surefooted on the intellectual dimension of the conservative challenge to the dominant liberal ideology of law, but that is a rather small weakness in an extremely strong book. See *infra* notes 18–23 and accompanying text.

6. Teles is aware of the limitations of such materials and correctly does not take what they say at face value, although occasionally his analysis might have been deepened by a somewhat more skeptical approach to these materials. For a brief discussion, see *infra* text accompanying note 17.

7. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–59 (1996) (identifying numerous factors—including the advent of legal realism, the New Deal, the constitutional crisis of 1937, the post-World War II emphasis on pluralism and democratic process, attempts to justify *Brown v. Board of Education* in the face of newfound concern about the counter-majoritarian difficulty, and nearly universal admiration of the Warren Court—that contributed to legal liberalism becoming the dominant ideology of the legal academy by the early 1970s). See generally MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (rev. ed. 2004) (examining the NAACP’s use of litigation to combat segregated schools).

8. Teles notes that his discussion of conservative public interest law firms does not deal with litigation efforts by the Religious Right. TELES, *supra* note 2, at 287 n.8. He observes that one good book on those groups has been published, which discusses the origin, character, strategies of, and reactions to conservative Christian public interest law. *Id.* (citing STEVEN P. BROWN, *TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS* (2002)). Yet another, published after Teles completed his manuscript, is HANS J. HACKER, *THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION* (2005), which discusses the sometimes conflicting motivating forces and internal group characteristics of the “conservative Christian public interest law firms of the New Christian Right,” *id.* at xii. Teles also observes that the framework he develops should be useful in analyzing such groups. TELES, *supra* note 2, at 287 n.8 (“I do believe that substantial work remains to be done on the subject, and that my emphasis on strategic choice and organizational development would add considerably to the foundation laid by Brown.”).

Teles’s relative inattention to ideas, though, means that his approach would not provide much insight into one important issue that has affected the course of litigation by religious conservative groups: a difference over whether such litigation should focus tightly on the Free Exercise Clause, thereby bringing the religious aspect of the litigation to the fore, or should treat religious expression as a form of speech protected by the Free Speech Clause, thereby reducing or even eliminating the specifically religious aspect of the litigation. Compare Brown, *supra*, at 47, 61 (arguing that the new Christian Right’s “focus on the free speech clause instead of the Constitution’s religious clauses” has “yielded a series of legal precedents that have fundamentally changed the relationship between church and state in America”), and Steven G. Gey, *When is Religious Speech Not “Free Speech”?*, 2000 U. ILL. L. REV. 379, 380–81 (quoting Jay Sekulow, chief counsel of Pat

ideology, his analysis brings out in sharp relief many new insights into the institutions that affect the outcomes of ideological contests. In addition, Teles connects his analysis to a broader theme in recent studies of American political development. The “rise of the conservative legal movement” was intimately connected to changes in the dominant political order that have occurred over the past thirty years: the decay of the New Deal–Great Society political order, and the Reagan Revolution and its limits.⁹ In these ways Teles provides a firm foundation for thinking (or perhaps merely speculating) about future developments in the institutional apparatuses associated with conservative and liberal legal thought.

This Review summarizes and critiques Teles’s analysis of the three components of the conservative legal movement, beginning with the least important, law and economics in the legal academy, and then turning to conservative public interest law firms and the Federalist Society. It concludes with some speculations about the future of that movement, in light of the connection Teles rightly draws between that movement and the American political regime of the late twentieth century.

II. Law and Economics in the Legal Academy

Teles begins the first of his two chapters on law and economics in the legal academy with the question, “Does the field of law and economics even belong in a book on the conservative legal movement?”¹⁰ He begins the second by quoting Morton Horowitz’s statement in 1980, “I have the strong feeling that the economic analysis of law has ‘peaked out’ as the latest fad in legal scholarship . . .”¹¹ The question is a fair one, and the statement less mistaken than one might think.

Teles suggests that the question is a fair one because many practitioners of law and economics “are quite liberal” and because law and economics is at least as much an heir to the legal-realist desire to place legal analysis on an empirical basis as it is a part of the conservative legal movement.¹² Yet, Teles notes, “[M]any conservatives, especially foundation patrons, saw in law and economics a powerful critique of state intervention in the economy, and a device for gaining a foothold in the world of elite law

Robertson’s American Center for Law and Justice, as saying in an interview that “the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment’s clause against the establishment of religion”), with Steven W. Fitschen, *Religion in the Public Schools After Santa Fe Independent School District v. Doe: Time for a New Strategy*, 9 WM. & MARY BILL RTS. J. 433, 435 (2001) (“I think it has been a mistake to posture free exercise claims and defenses as free speech cases.”).

9. See, e.g., TELES, *supra* note 2, at 56, 56–57 (describing their mostly unsuccessful challenge to the legal liberalism of the 1960s as convincing conservatives to develop their own “apparatus for legal change”).

10. *Id.* at 90.

11. *Id.* at 181.

12. *Id.* at 90.

schools.”¹³ In its former aspect, of course, law and economics was just a simpleminded version of neoclassical economics, and I doubt that there was any particular reason to think that supporting *legal* economists was a better way of developing and publicizing the critique of state intervention in the economy than supporting *pure* economists would have been.¹⁴ From my perspective, at least, what mattered about law and economics was the second point Teles emphasizes—that it gave conservatives a “foothold” in elite law schools.¹⁵

Teles provides a lot of detail about the development of the law and economics discipline, but I suspect that many readers not deep into law-school politics (and gossip) will find that the discussion has a flavor of “inside baseball” to it. The saga of Henry Manne is interesting (to me), and Teles provides details about the reasons for Manne’s peripatetic course among law schools¹⁶ that I had not known. Further, Teles’s treatment of law and economics relies heavily on memoranda written within conservative foundations by program officers, a data source that is truly hard to come by. Teles is sensitive to the distortions inherent in such memoranda: program officers have to show to their superiors on the foundation board that the officers actually do something other than rubber-stamp proposals, and they do so by bad-mouthing the proposals they recommend.¹⁷ Yet this does not mean

13. *Id.*

14. One indication of this may be the practice among legal economists of borrowing the prestige of the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel (the formal title of what is universally referred to as the Nobel Prize in Economics). For a discussion, see Mark V. Tushnet, *Law, Science, and Law and Economics*, 21 HARV. J.L. & PUB. POL’Y 47, 51 n.9 (1997). The conservative funders might have been correct, though, to the extent that many of the most prominent (conservative) practitioners of law and economics were better publicists than most economists and (or because) they provided simpleminded versions of economics of a sort with which serious economists would have been uncomfortable. See, e.g., Reza Dibadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325, 1333 (2006); Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 357 (2007) (both discussing critiques of law and economics analysis as, respectively, simplistic and outmoded).

15. TELES, *supra* note 2, at 206.

16. E.g., *id.* at 124–30 (providing details on the way in which Manne’s relations with Emory University’s president deteriorated and led to the termination of Manne’s ability to create a center for law and economics there). Through programs for judges and law professors, and law and economics conferences, Manne had the “first real entrepreneurial success for the [law and economics] movement.” *Id.* at 90. Although Teles does not emphasize it, his narrative does a reasonably good job of describing Manne’s personality, which I personally find attractively quirky but which also seems to have contributed to his difficulties in dealing with more bureaucratic types. Teles, for instance, recounts Manne’s colorful rejection of an invitation to join the Yale faculty, *id.* at 109, and his conflicts with administrators, which proved to be obstacles to his entrepreneurial goals, *id.* at 134.

17. Teles cites two memoranda from the Olin Foundation’s Grant Proposal Record from the Foundation’s archives. *Id.* at 202 (“Staff met with [Daniel] Rubinfeld [of Boalt Hall], and was not overly impressed.” (citation omitted)); *id.* at 203 (“[S]taff had mixed feelings [about a grant given to Georgetown University Law Center] because the quality of one conference was questionable.” (citation omitted)). Disclosure: I was a member of the faculty of Georgetown University Law

that they have any effect on what actually happens once the money flows from the foundation. Still, there is something amusing in reading memos written by program officers who could not get a decent academic appointment criticizing those who did. A bit more skepticism about the functions of these internal memoranda would have strengthened Teles's treatment, but this is a minor criticism.

A more important question is the one Teles raises: Who cares? That is, exactly what did conservatives get from a foothold in elite law schools by means of law and economics?¹⁸ The final clause in that question is important, and returns us to Horwitz's observation. Supporting law and economics made conservatives captives of economics. Simple-minded neoclassical economics was fine, because "markets work better than government" is a nice slogan. Low-hanging fruit were picked long ago, though. As a second and now a third generation of legal economists moved into the legal academy, simple-minded neoclassical economics became visibly marginalized. There are some who continue to mouth the slogans, but they are, more or less, figures who are not taken seriously, who are invited to conferences simply to fill out programs (and because of their continuing connection to funders), and who are disdained by the serious legal economists.

The reasons for this development are disciplinary in two senses. First, a young legal economist who wants to make a name and a career has to show that she is doing something different from and better than what the first generation did. Complexifying the economics is a sure way of doing so, but complexity makes sloganeering impossible. Second, even when law and economics took hold, economics itself was using more complicated models (and mathematics) than the legal economists favored by conservative foundations were.¹⁹ Or, put bluntly, the first generation of legal economists—the

Center at the time the memo was written, and although I was not involved in soliciting the grant, I believe I participated in the conference to which it refers.

18. See generally *id.* at 206 ("Given that law and economics' impact has occurred as the field has become more ideologically mainstream, did [conservative] patrons like the Olin Foundation really get what they were looking for?"). Here I think it important to note that Teles properly relies on a standard distinction between the use of economics in antitrust cases and the broader field of law and economics, which sought to apply the premises of neoclassical economics to essentially all fields of law. See *id.* at 95 (referring to "[l]aw and economics' origin in antitrust"). A parochial comment from someone (me) whose field is constitutional law: Law and economics has made almost no significant contributions to understanding constitutions or constitutional law, beyond dressing up completely familiar points in the garb of economics. I could provide citations, but refrain from doing so out of a perhaps misplaced sense of politeness.

19. See UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 57 (1997) (lamenting the fact that the early law and economics movement borrowed "broad theoretical categories" from economists and imported "simplified legal notions that economists have not rediscussed since Adam Smith . . . into legal scholarship," with the result that law and economics embraced "naturalist legal models" that are "simplistic and unrealistic"); see also Dibadj, *supra* note 14, at 1326–27 (criticizing "conventional interpretations of law and economics from within the literature of welfare economics itself" and concluding that "traditional law and economics deeply misunderstands modern advances in welfare economics").

ones whom the Olin Foundation was enthusiastic about²⁰—were pretty good economists for law professors, but they were no great shakes as economists as such.²¹ The better legal economists got as economists, the less clear the conservative spin of law and economics became.²² It turned out that in economics, as in much else, the most honest statement one could make about virtually anything of interest is, “It all depends.” Horwitz may have been premature in saying that law and economics, by which he meant law and economics based on simple-minded neoclassical economics, had already peaked in 1980,²³ but he saw that the peak was in sight.

In the end, I suspect that the only real accomplishment of law and economics in the legal academy was the one described by an Olin Foundation staffer in 1993: “[O]ur investment has paid off well at Harvard.”²⁴ Law and economics at Harvard was central to the internecine fight there over critical legal studies,²⁵ and it is (barely) imaginable that without external support for law and economics, proponents of critical legal studies and their supporters might have overcome opposition from conservative public law scholars there (and conservative alumni) to truly dominate the school.²⁶ Preventing the “capture” of Harvard Law School by critical legal

20. See, e.g., TELES, *supra* note 2, at 202 (reporting that at Stanford Law School, “the Olin Foundation saw supporting law and economics as a way of enhancing the resources of an already distinguished group of law professors sympathetic to market economics”).

21. There is an old joke, the punch line of which is, “Yes, but by captains is he a captain?” So too for the first generation of legal economists.

22. See TELES, *supra* note 2, at 206 (“[T]he number of true believers has declined as the field has become more professionalized.”). Teles explains that:

As the stigma on law and economics disappeared and it moved to a position of considerable distinction in legal academia, its ideological base expanded accordingly. The movement took on the ideological and methodological coloration of its parent discipline of economics The law and economics that has attained such an impressive status in top law schools is not, in short, the aggressively free-market faith of the movement’s early days.

Id. at 218.

23. His statement continued, “Future legal historians will need to exercise their imaginations to figure out why so many people could have taken most of this stuff so seriously.” *Id.* at 181. I take “this stuff” to refer to law and economics based on simple-minded neoclassical economics.

24. *Id.* at 198 (quoting Olin Grant Proposal Record, Olin Foundation Archives (Oct. 10, 1973)). In saying this, I am quite aware that my current institutional affiliation may affect my judgment.

25. Teles frames his discussion of law and economics at Harvard in such terms. See *id.* at 192, 192–99 (arguing that by supporting law and economics at Harvard Law School, conservative foundations “sought nothing less than the ideological redirection of the law school, and the defeat of its most dynamic faction, critical legal studies”).

26. On alumni concerns, I have only indirect evidence, though I am quite confident that there were some (and that more research on my part into Harvard’s publications would turn them up). For some indications, see Vance R. Coven, Harvard Law School Class of 1971, Letter to the Editor, *Puerile Notions*, HARV. L. REC., Nov. 15, 1985, at 9, which refers to Duncan Kennedy’s “adolescent superciliousness.” See also Editorial, *A Necessary Balance*, HARV. L. REC., Oct. 4, 1985, at 8 (urging the Law School “administration to take the lead in efforts to . . . encourage a more tolerant and more courteous debate” to prevent harm to “HLS as an institution and [to] the students”); Carl Shipley, Harvard Law School Class of 1948, Letter to the Editor, *Disservice*, HARV. L. REC., Apr. 20, 1984, at 11 (“[Duncan Kennedy] is doing a great disservice to Harvard

studies might have been quite significant. But, as I hope the preceding sentence suggests, I am skeptical that law and economics was quite as important as the Olin Foundation's staff thought. Beyond that, it is not clear to me how law and economics has any significance outside the legal academy.

III. Conservative Public Interest Law Firms

Teles's chapters on conservative public interest law firms are the best work on the subject that I know of. His basic point is that these law firms developed in two stages. In the first, conservatives directly emulated the liberal public interest law firms they saw around them.²⁷ Their efforts at this stage were a failure, though. The reason, Teles argues, is that the firms were too closely identified with the business community.²⁸ This caused several problems. First, liberal public interest law firms could claim that they brought lawsuits because collective action problems of various sorts—"Footnote 4" discrimination,²⁹ the low stakes individual consumers had in any individual regulatory controversy, and the like—impaired their constituents' ability to obtain relief from legislatures.³⁰ Businesses—at least large ones—could not make that claim.³¹ Second, the first generation of conservative public interest law firms was unable to pull off the public-relations move of identifying the interests of large businesses with the public

Law School."'). The celebrated debate over critical legal studies held at the Harvard Club in New York City and sponsored by the Federalist Society suggests to me that alumni concerns were heard. Teles describes the New York City Harvard Club debate as a conservative "effort to heighten the perception of a crisis" regarding critical legal studies at Harvard Law School. TELES, *supra* note 2, at 196.

27. TELES, *supra* note 2, at 67 (discussing Michael Horowitz's call for conservatives to learn from the liberal public interest law movement's placement of "its efforts on a higher moral plane than those of its adversaries" and its "engage[ment of] the loyalties of young attorneys and the national media" (quoting MICHAEL HOROWITZ, IN DEFENSE OF PUBLIC INTEREST LAW, THE PUBLIC INTEREST LAW MOVEMENT (1980)).

28. *Id.* at 68 (explaining that "the privileged role of business in the movement . . . hampered [the movement's] ability to seize the moral high ground and wage the battle of legal ideas"). Teles identifies a number of additional difficulties. One is the geographical rather than functional organization of the first generation of conservative public interest law firms. *See id.* at 81 (arguing that a later innovation of organizing a conservative interest law firm "*functionally* by issue instead of *geographically* by region" created the opportunity for strategic client selection). Another is some individual idiosyncrasies that led one such law firm to bet the house on a losing cause. *See id.* at 75–77 (describing the involvement of the Capital Legal Foundation in litigation brought by General William Westmoreland against the CBS television network).

29. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (famously proposing a higher level of judicial scrutiny in particular circumstances, including when laws fall within a specific prohibition of the Constitution, place restrictions on the political process, or discriminate against "discrete or insular minorities").

30. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 366 (1988) (explaining the competitive advantage that businesses have over individuals acting collectively in gathering information and using it to influence legislation).

31. As Dan Ernst pointed out to me, public interest litigation is a public good, and, in light of business's self-interest, there is no strong reason to think that business-oriented strategic litigation will be undersupplied.

interest.³² And, perhaps most important, the businesspeople on the boards of these law firms actually disagreed among themselves over the desirability of challenges to specific regulations.³³ Roughly speaking, larger businesses could accommodate themselves to many regulations without too much difficulty, and they understood that some of their smaller competitors could not.³⁴ Regulation, that is, sometimes helped individual businesses in the regulated marketplace.³⁵

At the second stage, conservative public interest law firms broke free from their dependence on support from business as such and turned to libertarian-leaning individuals, most of whom, of course, were successful businesspeople who were committed to conservative public interest litigation as a matter of principle rather than because such litigation would directly increase their profits.³⁶ The second generation was markedly more successful, within strict bounds. Its problem was that the regime transformation that occurred in the late twentieth century was not really committed to libertarian, or even roughly libertarian, principles. So, these law firms could win some cases and garner some favorable publicity, but they could not firmly embed their principles in constitutional law.³⁷

Consider several areas of constitutional law in which conservative public interest law firms were involved. The Institute for Justice, arguably the most successful of these firms, has won lawsuits for small businesspeople facing quite arbitrary licensing requirements.³⁸ It has also engaged in a

32. See TELES, *supra* note 2, at 68–69 (“The firms’ business-heavy caseload lent credence to their adversaries’ argument that, far from being defenders of the public interest, they were nothing more than shills for conservative business interests.”); *id.* at 226 (quoting a Center for Individual Rights memorandum as saying “conservative public interest law firms have been denounced as corporate America’s hired guns”).

33. See *id.* at 65 (explaining the division between supporters of free markets and supporters of business interests).

34. *Id.*

35. See *id.* (describing a conflict over cable-television regulation in Denver that “made it clear that free markets and business’s interests were necessarily in tension” and that conservative public interest law firms “could not expect their business base to stand up for libertarian causes when they damaged the interests of specific firms”).

36. *Id.* at 221. Here too the public-good nature of public interest litigation is relevant: Because such litigation is a public good, it will be undersupplied by the market. Conservative donors, including foundations, finance such litigation because ideological concerns are part of their preference functions (as such preferences are *not* part of the functions of businesses). Again I thank Dan Ernst for the point.

37. See *id.* at 222 (“Despite their impressive success, conservative public interest law firms face substantial constraints in their ability to reshape the law and American legal culture.”).

38. See, e.g., *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 665 (E.D. Tenn. 2000) (holding that casket sellers are not required to obtain a funeral director’s license because “[t]here is no reason to require someone who sells what is essentially a box to undergo the time and expense of training and testing that has nothing to do with the State’s asserted goals of consumer protection and health and safety”); *Cornwell v. Cal. Bd. of Barbering and Cosmetology*, 962 F. Supp. 1260, 1277, 1277–78 (S.D. Cal. 1997) (declining to dismiss a claim that California’s cosmetology licensing requirement violates the Equal Protection Clause because the required licensing curriculum could be shown to be

sustained challenge to regulations as effecting takings of private property without compensation.³⁹ Winning cases for barbers and funeral-home directors makes those individuals' lives better,⁴⁰ but it inflicts almost no damage to the post-New Deal regulatory apparatus. Conservative public interest law firms have had essentially no success and quite a bit of failure in their efforts to roll back significant environmental regulations, for example.⁴¹ The takings litigation culminated in the *Kelo* case,⁴² which everyone agrees called the revolution in takings law to a (perhaps temporary) halt.⁴³ Conservative public interest law firms supported challenges to affirmative action and succeeded in obtaining formal legal limits on the practice, but the extent to which those limits actually affect the prevalence of affirmative action is surely questionable.⁴⁴

Teles notes that the second generation of conservative public interest law firms consists of a relatively thin institutional structure—basically, the Institute for Justice and the Center for Individual Rights, an “A Team” without a “B Team.”⁴⁵ And its principles, admirable as they might be, do not fit well with today's regime principles, which I have described elsewhere as holding that government cannot do anything more than it is now doing, rather

“a covert attempt to prevent or minimize the practice of African hair styling in favor of ‘mainstream’ hair styling”).

39. TELES, *supra* note 2, at 241 (describing the Institute for Justice's use of Fifth Amendment takings litigation to mobilize supporters, redefine the political agenda, and shift public opinion).

40. *See supra* note 37.

41. *See* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, § 6 (Magazine), Apr. 17, 2005, at 42, 130 (discussing the sustained but frustrated effort of conservative litigation groups to promote their deregulatory philosophy to strike down federal environmental laws).

42. *See generally* *Kelo v. City of New London*, 545 U.S. 469, 483–84 (2005) (upholding a city's exercise of eminent domain authority to remedy urban blight via commercial redevelopment as satisfying the Fifth Amendment's “public use” requirement).

43. On the Institute for Justice and regulatory takings litigation, *see* TELES, *supra* note 2, at 241–44. Frank Michelman has argued that there never was a “takings revolution” at the Supreme Court level. *See* Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1601 (1988) (summarizing his conclusion that “there appears to be less than first meets the eye in these apparent doctrinal turns to heightened scrutiny and conceptual severance”). He also suggested to me that whatever progress had been made by conservatives was halted not by *Kelo* but by *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), and *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). *Lingle* held that the “substantially advances” formula is not sufficient to determine whether something constitutes a “taking” and that such a claim must be evaluated either as a physical taking, a total regulatory taking, or a land-use exaction, 544 U.S. at 545, while *Tahoe-Sierra Preservation Council* held that categorical, per se takings rules should be resisted and that takings should be evaluated so as to maximize fairness and justice through a reasonableness analysis. 535 U.S. 303–04.

44. *See, e.g.*, Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 62, 60, 56–77 (arguing that there are potentially “far-reaching implications” for the expansion of affirmative action programs that follow from the Supreme Court's conclusion in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that diversity constitutes a compelling interest because it promotes “extrinsic social goods like professionalism, citizenship, or leadership”).

45. For these terms, *see* TELES, *supra* note 2, at 254.

than that government cannot do anything well,⁴⁶ much less the regime principles that might emerge over the next decades. Conservative public interest law solved the organizational problems it faced at the outset by adapting institutionally, with the effect of sharply scaling back its potential to achieve real transformation in the dominant regime. Put another way, conservative public interest law firms were indeed part of the “rise of the conservative legal movement,” but the heights to which they rose were lower than conservative legal activists had hoped at the outset.

The story of conservative public interest litigation is important even so, less because it is a story of a rise to real heights than because it is a story of successful institutional innovation. The successes were not in what the second generation of public interest law firms accomplished, but in their creation in the first place. The institutional innovation had two components—patronage and a long time horizon. Individuals with money funded the law firms and, importantly, did not insist on immediate payoffs. The patrons understood that building counter-hegemonic institutions takes time.⁴⁷ Or perhaps “understood” is the wrong term. Teles suggests that conservative legal activists and their supporters stumbled upon a successful model for movement building.⁴⁸ The contrast with liberal funders in the late twentieth century is worth noting as well. Having established their institutions, liberal funders had a much shorter time horizon and typically financed only projects that promised payoffs within a relatively short time.⁴⁹

And, it might be observed in conclusion, we may have seen a return of business-oriented conservative litigation, but it is now outside the conservative legal movement’s institutional framework. As Richard Lazarus has argued, an elite Washington bar now represents businesses before the Supreme Court.⁵⁰ The businesses are the bar’s direct clients, and the lawyers

46. MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 32 (2003) (“The guiding principle of the new regime is not that government cannot solve problems, but that it cannot solve any more problems.”).

47. Teles describes “a ‘Gramscian’ approach of creating a parallel institution,” TELES, *supra* note 2, at 207, which is related to, but not quite the same as, the Gramscian idea of a “long march through the institutions.” See MARK V. TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 130–31 (2005) (describing “the long march through the institutions” as a move away from tactics such as political protest and open mobilization, and toward an emphasis on institutional reform to effect ideological change in civil society).

48. See TELES, *supra* note 2, at 277 (discussing the successes of conservative legal mobilization despite going “through a very long period of almost complete organizational failure” and “succeed[ing] by shrewd adaptation rather than by the far-sighted pursuit of a grand plan”).

49. This observation is not a criticism of funders on the liberal side during the Great Society and for perhaps a decade or two afterwards, because they were financing hegemonic institutions. As counter-hegemonic institutions developed, though, these funders failed to adapt quickly enough—that is, failed to supplement (at least) their short time horizon with a longer one.

50. See generally Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008) (describing the modern reemergence of an elite group of Supreme Court advocates with extensive experience and success in arguing before the Court).

are members of large law firms that make no pretense of having anything other than a client-driven agenda.⁵¹ It may be too soon to tell, but my impression is that the elite Supreme Court bar has done more to place limits on the regulatory state—through the development of a constitutional law of punitive damages and, in my view more important, through rather aggressive principles of federal regulatory preemption of state law in a world where federal regulators are themselves reluctant to regulate—than the second generation of conservative public interest law firms. The elite Supreme Court bar may be the institutional expression of the political regime of the late twentieth century—centered in Washington, without deep principled commitments to anything other than what clients want—not the conservative public interest law firms Teles discusses.

IV. The Federalist Society

Perhaps its leaders would be surprised at the comparison, but Teles's account of the creation and operation of the Federalist Society reminded me of nothing so much as of Felix Frankfurter and the "Happy Hot Dogs" of the New Deal.⁵² For Teles, the Federalist Society does four things: (1) it recruits law students and lawyers into the conservative legal movement; (2) it has meetings and debates that "acquaint them with conservative legal ideas and heighten their intellectual self-confidence"; (3) it "facilitate[s] the orderly development of conservative legal ideas and their injection into the legal mainstream"; and (4) it is a network of relations that, among other things, helps members get jobs.⁵³ All this was true of Frankfurter and his network.⁵⁴ He recruited students from his classes—and then from the classes taught by his protégés.⁵⁵ He challenged them to think hard about the new administrative state.⁵⁶ He and they wrote articles that made New Deal legal thought the new mainstream.⁵⁷ And, sitting first in Cambridge and then at the Supreme

51. Businesses purchase these services for profit-related reasons, and—again—such reasons imply that these services do not have a strong public-goods character. See *supra* notes 30, 35.

52. For an explanatory reference, see MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 229–30* (1982). Parrish explains that men such as Dean Acheson, Pat Jackson, Tom Corcoran, Frederick Wiener, Herbert Feis, and Alger Hiss "did not form a monolithic, ideologically coherent block of sentiment within the New Deal," but instead were united by their fondness for Frankfurter, gained office through his influence, and became known as his "happy hot dogs." *Id.*

53. TELES, *supra* note 2, at 136.

54. See generally PETER H. IRONS, *THE NEW DEAL LAWYERS* (paperback ed. 1993) (1982) (chronicling the influence of New Deal-era government lawyers on national politics and policy, and on litigation and legal doctrine).

55. See *id.* at 9 (discussing Frankfurter's placement of "scores of students in New Deal legal posts").

56. See *id.* at 8, 7–8 (describing Frankfurter's "ideals of administrative expertise and 'disinterested public service'" (citation omitted)).

57. See PARRISH, *supra* note 52, at 160 (reporting that "in a series of notable law review articles, books, and unsigned editorials," Frankfurter displayed a "rapierlike prose style" that had a significant influence on a "broad . . . audience of informed lay opinion").

Court, Frankfurter operated a job placement service for his students and protégés, finding them jobs in the executive, legislative, and especially administrative arms of the New Deal.⁵⁸ Having accumulated insider knowledge of the new administrative state, these lawyers then created the modern Washington law firm, adept at administrative law in its classic sense (judicial review of agency action), and worked with agencies and Congress to develop rules favorable to the interests of their clients or to limit the effectiveness of rules unfavorable to those interests.⁵⁹

The Federalist Society did not start out as a job-placement service, of course. Rather, it evolved into one. Teles emphasizes several important points about the Federalist Society as an organization: the continuity of its leadership;⁶⁰ its “big-tent” conservatism, which allowed it to avoid the internecine battles that often consume more sectarian groups;⁶¹ and its consistent self-conception and operation as what Teles describes as a debating society rather than as an organization directly intervening in politics.⁶² The last flowed organically from the Society’s origins as an organization for conservative law students who felt isolated in their schools.⁶³ Isolation is a relative matter, of course,⁶⁴ and the fact that the Federalist Society readily located large-scale foundation support indicates that, whatever the psychological

58. See IRONS, *supra* note 54, at 8 (noting that Frankfurter “stuffed” his protégés into New Deal agencies through his influence with the Roosevelt Administration with the result that “his former students far outnumber[ed] those from other schools and occup[ied] the most influential New Deal legal positions”); see, e.g., PARRISH, *supra* note 52, at 223–29 (reciting Frankfurter’s placements of former students and protégés in the Department of Labor, the Solicitor General’s Office, and the Department of Agriculture).

59. For an early account along these lines by a Frankfurter insider, see generally CHARLES A. HORSKY, *THE WASHINGTON LAWYER* (1952).

60. See TELES, *supra* note 2, at 179. According to Teles:

The success of the Society was not premeditated, but has been the product of the careful strategic leadership of a tight network of individuals who have been with the organization since its founding, in tandem with foundation executives and the well-placed senior members of the conservative legal community who assisted the Society at critical junctures.

Id.

61. See *id.* at 153 (“This denial of position-taking could easily be seen as a ruse, but this would be a critical mistake, since stopping short of drawing out the policy or legal consequences of its principles serves vital organizational maintenance, enhancing the Society’s role in the larger conservative movement.”).

62. See *id.* at 153, 164.

63. See *id.* at 173 (discussing conservatives’ perceived exclusion from law school faculties and law school culture).

64. Without doubting the accuracy of describing the self-understanding of early Federalist Society members as “isolated,” I am quite skeptical about *actual* isolation as a description of reality—as compared, for example, to the isolation of serious leftist students in law schools in the late 1960s and early 1970s (a group in which I include myself). We were truly isolated, I think, but many of us did not really care, a point captured in the first part of the concluding sentence of Roberto Unger’s essay on the critical legal studies movement (less so in the second): “[W]e turned away from those altars, and found the mind’s opportunity in the heart’s revenge.” Roberto Mangeibera Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 675 (1983).

state of its young-adult founders, their social location was hardly isolated.⁶⁵ Teles reports that the Society's organizational characteristics were developed spontaneously,⁶⁶ as the Society's admirers of Hayek might appreciate,⁶⁷ although I suspect that his interviewees offered accounts that had a somewhat more "Gee whiz, Mom, look what we accomplished!" tone than is probably warranted.

The Federalist Society has operated as a successful network for moral support and job placement. Whether it can continue to do so is, I think, an open question. As to moral support, at this point complaints by Federalist Society members about being marginalized in law schools—and therefore needing moral support from a network—seem to me to have degenerated into self-centered whining.⁶⁸ Monica Goodling certainly did not regard membership in the Federalist Society as something to be concealed "in the closet."⁶⁹ And, if things change, well, perhaps turnabout is fair play.

The job-placement function was immensely aided by divided government during most of the late twentieth century. Except for a brief period in Bill Clinton's first term, conservative Republicans always controlled one or more of Washington's main institutions—the presidency and administrative agencies for most of the period, the Senate for a while, and then both houses of Congress at century's end. Federalist Society members always had somewhere to go. Note, though, the difference from the Happy Hot Dogs: Federalist Society members who got government jobs did not create new institutions that could employ them after they left the government. Rather, they found jobs in already-existing law firms.⁷⁰ I believe this is yet another

65. See TELES, *supra* note 2, at 151 ("Conservative foundations were especially vital in the Society's early years . . .").

66. See *id.* at 165 (explaining the development of Society networks without "any direction from the center").

67. See *id.* at 92–93 (characterizing Hayek as a classical liberal thinker who viewed networking as a way to correct for the "scattering" of advocates for classical liberalism and who founded the Mont Pelerin Society to attempt to accomplish this goal).

68. Teles observes that "[t]his function was . . . more important in the Society's early years." *Id.* at 166. But see *id.* at 158–59 (quoting a confidential interview taken, apparently, after 2000, in which a "former official in the George W. Bush administration" refers to "membership and especially leadership in the Federalist Society" as "a costly signal of commitment to legal conservatism").

69. For the phrase, see *id.* at 165. On Monica Goodling, see generally U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>. The Report summarizes its conclusions about Goodling: "[O]ur investigation found that she solicited and received résumés for [Immigration Judge] and [Board of Immigration Appeals] candidates from the White House, from Republican members of Congress, the Republican National Lawyers Association, the Federalist Society, and from individuals with Republican Party affiliations." *Id.* at 121.

70. Compare TELES, *supra* note 2, at 25 (chronicling the formation of liberal public interest law firms by former members of the FDR administration), with *id.* at 61, 64 (discussing the formation of two early conservative public interest law firms—Pacific Legal Foundation, which drew support

indication of the limited extent of the conservative movement's rise, and of the residual effects prior regimes always have.⁷¹ As the administrative state has not been dismantled or even substantially whittled down, all that conservative legal activists can do is what the Happy Hot Dogs had done—learn to make a living from it.

V. Reflections and Conclusions

As I noted in the Introduction, Teles locates his descriptions in a larger theoretical framework associated with the political-science approach known as American political development, which focuses on relatively large-scale regime transformations. The big picture is clear enough: facing a moribund New Deal–Great Society political order with its associated institutions, conservatives first developed alternative institutions, including those of the conservative legal movement, then attempted to implement their program in the Reagan–Gingrich era. I have suggested that conservatives succeeded in displacing the New Deal–Great Society order but failed to replace it with a conservative one. Rather, divided government prevailed through the Reagan–Gingrich Era.

According to Søren Kierkegaard, life must be lived forwards but can be understood only backwards.⁷² Liberal legal theory came to its conceptualization of the role of public interest law firms only in the late 1960s, when the New Deal–Great Society political order was on its last legs. Is Teles's conceptualization of the conservative legal movement timed similarly? Speculation about what comes next is only that. Scholars of American political development have identified two important features of the U.S. political order: Every regime leaves behind a residue with which its successor must deal, and every successor regime considers how it can appropriate the institutional innovations of its predecessor for its own purposes.⁷³ My speculations focus on both sides of the political spectrum.

from the California Chamber of Commerce, and Mountain States Legal Foundation, which was founded and financially supported by Joseph Coors).

71. *Id.* at 180 (summarizing the conservative legal movement's "inject[ion of] competition into the legal profession" but its failure to create "a new establishment").

72. SØREN KIERKEGAARD, *THE ESSENTIAL KIERKEGAARD* 12 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 2000) (1843). Relatedly, "[T]he owl of Minerva begins its flight only with the onset of dusk." G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 23 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

73. See Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building in the Fullness of Time*, in *POLITICAL ORDER: NOMOS XXXVIII*, at 111, 138 (Ian Shapiro & Russell Hardin eds., 1996) (articulating a theory of political institutional development that "replac[es] the expectation of an ordered space bounded in synchronized time with the expectation of a politicized push and pull arrayed around multiple institutional arrangements with diverse historical origins"); see also Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 *POL. SCI. Q.* 689, 702 (1998–1999) ("[A] regime may hang together for a time, but it never really fits together, and the contentious interaction of old and new elements keeps it in a more or less constant state of transformation.").

On the liberal side, we can see the residue of the New Deal–Great Society order in the transformation of the American Bar Association (ABA) from a generally conservative organization with a particular focus on relatively narrow professional issues into a generally liberal organization offering support for liberal programs across a rather wide range of issues.⁷⁴ Liberals also emulated the conservative legal movement by creating a counter-Federalist Society (the American Constitution Society), structured in roughly the same form as the Federalist Society, and a think tank with substantial foundation funding and a relatively long-term perspective (the Center for American Progress). As Teles emphasizes, though, direct appropriation of the institutional forms of liberal legalism did not work for the conservative legal movement, and it remains to be seen whether liberals’ appropriation of the institutional forms of the conservative legal movement will work—or even be sustained into the next constitutional era.⁷⁵

On the conservative side, the risks are familiar. At the lowest level, but arguably the most important one, we can detect a fair amount of self-satisfaction in the interviews Teles conducted.⁷⁶ If conditions change, as they inevitably will, the conservative legal movement will have to innovate again, and it is unclear to me that self-satisfied organizers are likely to do so. And, as I have suggested in discussing the current state of law and economics and the Federalist Society job network, it is also unclear whether the conservative legal movement has available a second generation of potential innovators.⁷⁷ Related to this, institutions always face the problem of organization maintenance under changed conditions, with the modal response being neurosis—continuing to do what has been done even in the face of change. If I am right in suggesting that the conservative legal movement’s achievements were limited by the nature of the divided-government regime of the late twentieth century, neurosis is a promising strategy for

74. Teles provides descriptions of how people associated with the conservative legal movement came to see the ABA in the late twentieth century. See TELES, *supra* note 2, at 156–58 (relating the Federalist Society’s concern with respect to biased ABA ratings of federal judicial nominees); *id.* at 167–69 (detailing the Federalist Society’s criticism of the dissenters on the ABA panel that endorsed Judge Robert Bork for the Supreme Court vacancy). Their perceptions were accurate.

75. I personally am quite skeptical about the possibility that liberal funders will continue to take the long view and support institution-building outside the government in the event that liberals retake control of the government’s institutions.

76. I find it particularly jarring, and not encouraging about their intellectual nimbleness, for conservatives to continue to present themselves as victims and to continue to focus on the Bork nomination twenty years after the event. See *generally* TELES, *supra* note 2, at 169, 169–71 (illustrating the “sense of martyrdom” that conservatives have continued to use as motivation in the aftermath of the Bork nomination).

77. See *supra* text accompanying note 45 (discussing the absence of a “B Team” of conservative public interest law firms); see also TELES, *supra* note 2, at 173–78 (discussing the limited effectiveness of the Olin Foundation in replenishing the supply of conservative law professors).

organizational maintenance only if conservatives manage to create a unified conservative political order, which at this moment seems quite unlikely.⁷⁸

Organizational maintenance, then, can degenerate into ossification. Conservative public interest law firms may continue to raise money and file law suits, with increasingly small payoffs, because they do not know how to do anything else and their employees have nowhere else to go. The Federalist Society will continue to hold national meetings and local events, but its job-placement function may be increasingly difficult to perform. In short, the conservative legal movement, having risen, may well plateau—which would be too bad from an intellectual point of view, because its rise, as recounted by Teles, tells us a great deal about the U.S. political order in the late twentieth century. But then, of course, so would the plateauing of the conservative legal movement tell us much about the U.S. political order in the early twenty-first.

78. Control by Democrats of both houses of Congress seems assured for the near future, which would make unified conservative government impossible.